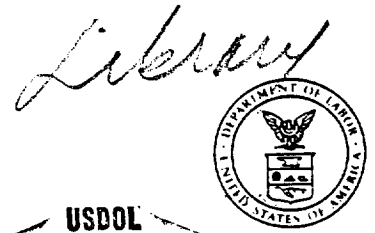


U.S. Department of Labor

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036



.....
In the Matter of :
:
VOSBURGH ORCHARDS :
Plaintiff :
:
v. :
:
EMPLOYMENT AND TRAINING ADMINISTRATION, :
U.S. DEPARTMENT OF LABOR :
Defendant :
.....

USDOL
ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-21-2010 BY 60322
CASE NO. 82-WPA-8

DECISION AND ORDER

This is a proceeding filed under Section 12 of the Wagner-Peyser Act, 29 U.S.C. §349k, and the regulations set forth at 20 C.F.R. §654.400 et seq.

Vosburgh Orchards requested a permanent structural variance from the housing standards set forth at 20 C.F.R. §654.407(c)(1). Thereafter, the Regional Administrator of the Employment and Training Administration, U.S. Department of Labor, issued his decision denying the request. Vosburgh Orchards then requested a hearing pursuant to 20 C.F.R. §654.402(d). 1/

Vosburgh Orchards, the plaintiff herein, challenges the denial of his variance request with respect to §654.407(c)(1). 2/

To qualify for a permanent structural variance, the employer must:

1/ By order dated October 4, 1982, the Judge indicated that the issues can be resolved on the basis of the written record and an evidentiary hearing is not required. The parties were given 20 days from the date of the order to indicate contrary views. No pleadings were filed and hence, as stated in the October 4, 1982 order, this matter will be decided on the basis of the written record and without an evidentiary hearing.

2/ Section 654.407(c)(1) provides that: "The following space requirements shall be provided: (1) For sleeping purposes only in family units and in dormitory accommodations using single beds, not less than 50 square feet of floor space per occupant."

(1) Show that the variance is necessary to obtain a beneficial use of an existing facility and to prevent a practical difficulty or unnecessary hardship; and

(2) set forth the specific alternative measures which the employer has taken to protect the health and safety of workers and adequately show that such alternative measures have achieved the same result as the standards from which the employer seeks a variance (§654.402(a)).

The plaintiff in this matter seeks an exemption from the provisions of §654.407(c)(1) for housing which presently fails to comply with the housing standards in the regulation because the room in question contains only 144 square feet as opposed to the 150 square feet required by the regulation for the occupancy by three persons. The plaintiff states that the room in question is well lit and ventilated and that the cost of correction would be excessive.

The record, however, does not contain any facts to support the plaintiff's assertion that correction would be excessive. Moreover, the plaintiff supplies no facts or details to support its contention that the room is well lit and ventilated.

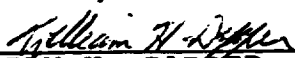
The regulation requires the plaintiff to show that the variance is necessary "to prevent a practical difficulty or unnecessary hardship." The plaintiff has not submitted facts which substantiate the claim that compliance with the regulation would be unduly burdensome or impracticable.

Although the variances requested herein do not represent a substantial departure from the requirements of the regulations, the fact remains that the plaintiff has the burden of proof and that burden cannot be satisfied by conclusory and factually unsupported recitals.

Thus, the plaintiff has the burden of proving the essential elements of its case and an applicant for a waiver from a regulation "has the burden of convincing the agency that it should depart from the general rules and of demonstrating to the reviewing court that the agency's reasons for refusing to do so were so insubstantial as to amount to an abuse of discretion." Ashland Exploration v. Federal Energy Regulatory Commission, 631 F.2d 817 (D.C. Cir. 1980)

As detailed above, the plaintiff has not sustained his burden of proof and accordingly is not entitled to prevail, notwithstanding the fact that the Regional Administrator's denial was in conclusory form and the defendant did not make a separate evidentiary presentation.

Accordingly, the Regional Administrator's decision is affirmed and this appeal is hereby dismissed.



WILLIAM H. DAPPER
Administrative Law Judge

DEC 16 1982

Dated: _____
Washington, D.C.

WHD/paw

SERVICE SHEET

CASE NAME: Vosburgh Orchards

CASE NO.: 82-WPA-8

TITLE OF DOCUMENT: DECISION AND ORDER

A copy of the above document was sent to the following parties

on DEC 16 1982.

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